IN THE
Supreme Court of the United States

October Term 1979

No. 78-1175

HATZLACHH SUPPLY CO., INC.,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR PETITIONER

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OPINION BELOW

The opinion of the Court of Claims (App., pp. 25a-32a)[1] is reported at 579 F.2d 617.

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[1]"App." refers to the Appendix filed with this Brief.

JURISDICTION

The opinion and judgment of the Court of Claims were entered on July 14, 1978. On September 29, 1978, the Court of Claims denied a timely petition for rehearing (Pet. App., p. 9a).[2] On December 8, 1978, Mr. Chief Justice Burger extended the time for filing a petition for a writ of certiorari to and including January 27, 1979 (Pet. App., p. 10a). The petition was filed on January 26, 1979, and was granted on May 14, 1979. 99 S.Ct. 2158. The jurisdiction of this Court rests upon 28 U.S.C. § 1255(1).

QUESTION PRESENTED

Whether the United States may be held liable for breach of an implied contract of bailment when goods seized from an importer by the United States Customs Service are lost while in the temporary custody of the Customs Service.

STATUTORY PROVISIONS INVOLVED

The Tucker Act provides, in relevant part, as follows:

28 U.S.C. § 1491:

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

[2] "Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari filed in this case.

The Federal Tort Claims Act provides, in relevant part, as follows:

28 U.S.C. § 1346(b):

Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2680:

The provisions of this chapter and section 1346(b) of this title shall not apply to —

* * *

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

* * *

STATEMENT

Petitioner imported camera supplies and other items from Germany valued at approximately $577,000. Upon the arrival of some of these goods in New Jersey, a routine inspection showed a discrepancy between the merchandise description on the delivery application and the invoices for

the goods. Taking action which the court below described as "perhaps of questionable severity" (App., p.26a), the United States Customs Service seized the goods and declared them "subject to forfeiture" pursuant to 19 U.S.C. § 1592.[3]

Petitioner followed the statutory and regulatory procedures[4] to obtain relief from the seizure, informing Customs that it had no role in the preparation of the merchandise description on the application, which was handled by a broker, and challenging Customs' authority to seize the goods in those circumstances (App., pp. 10a-22a). Customs agreed to return the merchandise upon payment of $40,000 (App., pp. 3a, 5a).

Petitioner complied with Customs' demand, but when the shipments were returned, merchandise valued at $165,220.50 was missing. Petitioner thereafter brought suit in the Court of Claims alleging, *inter alia,* a breach of an implied contract of bailment. The government moved for summary judgment, claiming that no bailment had been created and that, in any event, the suit was barred by sovereign immunity. The Court of Claims granted the government's motion and dismissed the petition. The court held that there was "clear congressional intent to retain sovereign immunity" with regard to claims arising out

[3]The provisions of 19 U.S.C. § 1592 were amended in 1978. See n. 7, *infra.*

[4]*See* 19 U.S.C. § 1618; 19 C.F.R. §§ 23.23-25 (1970). Section 1618 of Title 19 of the United States Code and sections 23.23-25 of Title 19 of the Code of Federal Regulations have been amended since the initiation of this action, but the amendments are not relevant to the manner in which the petition was filed with Customs and Customs agreed to return the goods in issue here. The successor provisions to 19 C.F.R. §§ 23.23-25 can be found at 19 C.F.R. §§ 171.11-13.

of the Customs Service's "detention" of goods, including claims for loss or damage to goods (App., pp. 25a-32a).

INTRODUCTION AND SUMMARY OF ARGUMENT

Some unknown person or persons appear to have taken more than $165,000 worth of petitioner's camera supplies while they were being held in the custody of the United States Customs Service. The issue in this case is whether Congress intended to deny petitioner the legal right to have the Customs Service either return all the goods it had taken or make petitioner whole for whatever goods are missing. The Court of Claims acknowledged that the statutes which govern seizure and detention of goods by Customs "could make a strong case for the existence of an implied-in-fact contract properly to preserve and redeliver all the goods" to petitioner (App., p. 30a). The court held erroneously, however, that petitioner could not recover upon an implied contract because of the exception in the Federal Tort Claims Act for claims arising in respect of the "detention of any goods or merchandise by any officer of customs." 28 U.S.C. § 2680(c).

1. A bailment was created by the Customs Service's taking of petitioner's goods, by its statutory duty to return the goods if forfeiture proceedings resulted in judgment for the petitioner, and by its explicit undertaking to return the goods upon payment of $40,000. That contract was breached when the shipments were returned with a significant portion of the goods missing. In analogous circumstances, this Court and lower federal courts have recognized implied contractual obligations binding upon the government.

2. Our challenge to the Court of Claims' refusal to enforce this implied contract proceeds upon two alternative

grounds. Our first argument accepts, *arguendo,* the assumption that the exclusions of the Federal Tort Claims Act govern an implied contract action such as this one. Nonetheless, Section 2680(c) does not bar liability when the Customs Service does not merely "detain" goods but loses or damages them. The language of Section 2680(c) of the Federal Tort Claims Act prohibits suits based upon the "detention" itself; it does not bar recovery for loss or damage to goods while they are in the custody of the Customs Service.

The overbreadth of the Court of Claims' construction of Section 2680(c) is proved by comparing the limited language of that subsection with the broader language of other subsections, including the preceding subsection, which bars suits against the Postal Service "arising out of the loss, miscarriage, or negligent transmission" of the mails. The legislative history of Section 2680 demonstrates that Congress enacted subsection (b) to immunize the Postal Service from suits growing out of damage or loss to goods in its custody. But in enacting subsection (c), Congress had a different purpose: It wanted to avoid providing a federal remedy that would duplicate already existing procedures for challenging unlawful detentions or excessive duties imposed by government agents. Thus, subsection (c) deliberately contains no exemption from liability for loss or damage to goods while they are being detained by such officers. Congress intended to make the United States liable in these cases.

3. Our second argument is that the exemptions prescribed in the Federal Tort Claims Act, which appear in Section 2680, apply only to actions in tort, and not to suits for breach of contract brought under the Tucker Act. The decided cases confirm that the existence or denial of a

remedy under one of these two statutes has no effect on the availability of a remedy under the other.

4. There is no policy reason whatever to immunize government agencies that damage or lose private property which is temporarily in their custody. Particularly in the case of Customs seizures, private citizens have no standard commercially feasible means of insuring against such losses and the government makes none available. An owner of property that is temporarily in the custody of the Customs Service, whether by valid or invalid seizure, should be granted compensation by the bailee when, through no fault of the owner, the Customs Service mishandles or loses property. Any other legal rule would encourage carelessness and tolerate theft on the part of government agencies at the expense of the taxpayer.

I
THE SEIZURE AND DETENTION OF PETITIONER'S GOODS CREATED AN IMPLIED CONTRACT OF BAILMENT

A. The Common Law Recognized a Bailor-Bailee Relationship in These Circumstances.

We turn first to the question whether the relationship between petitioner and the Customs Service was that of bailor and bailee, as the viability of petitioner's contract claim depends on the existence of such a legal relationship. The general rule was laid down by this Court more than a century ago in *United States* v. *Thomas,* 83 U.S. (15 Wall.) 337 (1872), a case involving the responsibility of a

"surveyor of the customs for the port of Nashville, Tennessee." This Court said (15 Wall. at 345):

> A public officer having property in his custody in his official capacity is a bailee; and the rules which grow out of that relation are held to govern the case.

Although the issue in the *Thomas* case was the precise legal duty which the collector of customs owed *to the government*, the Court in the *Thomas* opinion surveyed a range of situations involving government custodians who secure temporary control over private property. It discussed the common-law obligations of the Postmaster-General with respect to "matter deposited in the post office" (15 Wall. at 343-344), and the legal responsibility of sheriffs with respect to "goods seized in execution" (15 Wall. at 344). The Court concluded that the governing legal principles in all these cases are found in "the doctrine of bailment," This conclusion rested, in part, on the respected authority of *Story on Bailments*, which the Court cited (15 Wall. at 342-343):

> It is laid down by Justice Story that officers of courts having the custody of property of suitors are bailees, and liable only for the exercise of good faith and reasonable diligence, and not responsible for loss occurring without their fault or negligence.

In his classic treatise on bailments, Justice Story also announced a similar rule with regard to "revenue officers and others, who seize property for supposed forfeitures." *Story on Bailments* § 618 (7th ed. 1863).[5] Hence it is clear

[5]Authority for this rule was Justice Story's own opinion, while sitting as Circuit Justice, in *Burke v. Trevitt*, 4 Fed. Cas. 746 (No. 2,163) (D. Mass. 1816). The defendant in *Burke v. Trevitt* was the captain of

that, under common-law principles, the Customs officials who seized petitioner's camera supplies became bailees, with an implied contractual duty to petitioner to keep its goods "with the same caution with which a prudent person would keep his own property." *Burke* v. *Trevitt*, 4 Fed. Cas. (No. 2,163) 746, 749 (D. Mass. 1816) (Story, J.). *Accord, Averill* v. *Smith*, 84 U.S. (17 Wall.) 82, 92-93 (1872); *Agnew v. Haymes*, 141 F. 631 (4th Cir. 1905).

Under established agency principles, the United States, as the employer of the Customs officials acting within the scope of their duties, is bound by the implied contract growing out of the officials' acts. The individual employees are bailees on behalf of the United States, which is their principal. *Agnew v. Haymes*, 141 F. 631 (4th Cir. 1905). *See United States* v. *Lynah*, 188 U.S. 445 (1902); *Cooke* v. *United States*, 91 U.S. 237 (1875); *Bank of Boston* v. *United States*, 10 Ct.Cl. 519, 543 - 544 (1874), *aff'd*, 96 U.S. 30 (1878).[6]

a revenue cutter who had seized a schooner carrying tobacco, for an alleged violation of the revenue laws. When the trial resulted in an acquittal and the schooner was returned, the tobacco was missing, apparently as a result of a night-time theft.

In reliance on common-law precedent, Mr. Justice Story held that government agents seizing property in this manner (4 Fed. Cas. at 748),

> are generally bound for two things, for safe and fair custody, and, if the property is lost, or destroyed, for want of that safe and fair custody, they are responsible for the loss.

[6]Of course, the government is liable only if the actions of its employees are within their actual or ostensible authority. If a government agent acts totally outside the range of his delegated authority, the ordinary rules of principal and agent might entitle the United States to disclaim his conduct and refuse to be bound by an unauthorized action he has taken which gave rise to a claim of implied contract. That appears to have been the reasoning on which the Court (cont'd)

B. The Circumstances of the Seizure Gave Rise to an Implied Contract.

Treating the United States as a bailee under an implied contract is consistent with the specific statutory and voluntary obligations assumed by the United States in this case and with the general rules regarding implied contracts that arise out of governmental functions.

Petitioner's goods were seized by the Customs Service upon an alleged violation of 19 U.S.C. § 1592, which prohibited the importation of goods under an incorrect declaration. Upon seizure, the merchandise became "subject to forfeiture."[7] Petitioner asserted that the inaccuracy

of Claims based its very early decision in *Schmalz v. United States*, 4 Ct.Cl. 142 (1868), where the government was not held liable for the loss of goods where there was no "reasonable cause for the seizure." 4 Ct.Cl. at 148.

[7]The seizure was undertaken pursuant to the then existing provisions of 19 U.S.C. § 1592. Tariff Act §592, Ch. 497, § 592, 46 Stat. 750 (1930); Ch. 438, § 304(b), 49 Stat. 527 (1935). That statute was amended in 1978. 92 Stat. 893. The prior statute provided, in relevant part:

> If any consignor, seller, owner, importer, consignee, agent, or other person or persons enters or introduces, or attempts to enter or introduce, into the commerce of the United States any imported merchandise by means of any false statement . . . or makes any false statement in any declaration under the provisions of section 1485 of this title (relating to declaration or entry) without reasonable cause to believe the truth of such statement, . . . whether or not the United States shall or may be deprived of lawful duties, or any portion thereof, accruing upon the merchandise, . . . such merchandise . . . shall be subject to forfeiture, which forfeiture shall only apply to the whole of the merchandise. . . .

The current statute, by contrast, permits seizure in more limited circircumstances, *i.e.*, where seizure is necessary to protect the revenue, or is necessary to prevent entry of prohibited merchandise or the im-

in the declaration was the result of a technical error by the customs broker who handled the transaction and that, in any event, the seizure was not authorized by the statute (App., pp. 10a - 22a).

These arguments could have been pressed at a forfeiture proceeding, and if petitioner had prevailed, the Customs Service would have been obliged to return petitioner's merchandise intact, pursuant to 28 U.S.C. § 2465, which states:

> Upon the entry of judgment for the claimant in any proceeding to condemn or forfeit property seized under any Act of Congress, such property shall be returned forthwith to the claimant or his agent.

Following an alternative procedure,[8] petitioner filed for remission of the forfeiture pursuant to 19 U.S.C § 1618,

porter is insolvent. 19 U.S.C. §1592(c)(5). Moreover, under the current statute, penalties of less than the entire value of the merchandise are provided, with lesser penalties for negligence than for fraud. There are no penalties for nonnegligent misstatements or clerical errors.

[8]Because the then existing provisions of 19 U.S.C. § 1592 imposed a penalty of wholesale forfeiture of the merchandise without regard to degree of culpability, petitioner could avoid the risk of a wholly inequitable forfeiture only by petitioning for remission and accepting whatever mitigated penalty the Customs Service set. In recommending the Customs Reform Act which amended 19 U.S.C. §1592, the Senate Finance Committee noted (S. Rep. No. 95-778, 1978 U.S. Code Cong. & Adm. News, p. 2214):

> The respondent is forced to choose between accepting the mitigated administrative penalty or face a Government suit, in which case the claim is for full forfeiture value. The court can only decide whether or not a violation occurred. It cannot change the amount of the statutory penalty, domestic value.
>
> The risks of litigation are enormous . . . .

(cont'd)

which permits remission if the error was not intentional or if there were mitigating factors. In response, the Commissioner offered to return the goods upon payment of a $40,000 penalty (App.,pp. 3a, 5a).

In these circumstances, there was an implied-in-fact contract between the United States and petitioner to hold and preserve petitioner's goods. The implied contract was based upon (1) the statutory context of the Customs Service's seizure and detention of petitioner's goods pending either a judicial forfeiture proceeding or an administrative resolution and (2) the Service's representation to petitioner that it would return the goods. During the period following the seizure, the goods were to be "placed and remain in the custody of the collector . . . to await disposition according to the law." 19 U.S.C. § 1605. The Customs Service was under a specific statutory duty to return the goods if petitioner prevailed. 28 U.S.C. § 2465. And it is uncontroverted that the Customs Service explicitly agreed to return the goods upon payment of a $40,000 penalty. There is nothing in the record — no disclaimer of liability and no regulation limiting responsibility for goods — to negate a duty and an intention on the part of the United States to return to the petitioner all of its merchandise.[9]

In a similar statutory framework, the Court of Appeals for the Second Circuit concluded that the United States

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In these circumstances, Congress found that "[v]irtually every importer petitions for mitigation," and most importers pay the mitigated penalty rather than risk litigation. *Id.* at p. 2229.

[9]These factors clearly bring this claim into the area of contracts "implied in fact" as contrasted with those "implied in law." Thus, even if the latter may not be the basis for recovery under the Tucker Act, *Merritt v. United States,* 267 U.S. 338, 341 (1925), that rule is inapplicable here. *See Algonac Mfg. Co. v. United States,* 428 F.2d 1241, 1256 (Ct.Cl. 1970).

had the implied-in-fact contract responsibilities of a bailee. In *Alliance Assurance Co. v. United States,* 252 F.2d 529 (2d Cir. 1958) (Pet. App., pp. 11a - 24a), goods were detained for inspection by Customs for determination whether they were of the value and quantity declared in the invoice. The goods passed inspection, but they disappeared before they could be returned to the importer, whose subrogee thereafter sued the United States for breach of an implied contract of bailment. The government asserted that no contract of bailment was created by Customs' control over the merchandise.

The Second Circuit ruled, however, that an implied contract of bailment existed because the process by which the goods were detained and held by the Customs Service created a mutual understanding that the goods would be returned (252 F.2d at 532):

> The obligation of the government . . . stemmed from an implied promise to redeliver the goods as soon as customs had checked them against the invoice. . . . It arises from the implied promise to return the goods to the lawful owner after the customs inspection has been completed.

In this case, as in *Alliance,* the statutes and regulations demonstrate that an implied-in-fact contract existed.[10] Even the Court of Claims said (App., p. 30a):

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[10]The sole difference between the procedures in *Alliance* and those here — a difference which the Court of Claims mentioned but upon which it did not base its decision — is that the merchandise in *Alliance* was simply "detained" for comparison of the goods and the invoice, while in this case, the merchandise was "seized" and "subject to forfeiture." *Compare* 19 U.S.C. §1499 *with* former 19 U.S.C. §1592. Under the procedures at issue in *Alliance*, merchandise could not be

(cont'd)

> [T]he statutes cited by the plaintiff, along with the action of [Customs] in agreeing to return the seized goods upon payment of a $40,000 fine by Hatzlachh, could make a strong case for the existence of an implied-in-fact contract properly to preserve and redeliver all the goods to Hatzlachh.

C. The Government Has Been Held Liable on Implied-In-Fact Contracts in Analogous Circumstances.

The legal proposition being urged in this case is far from a novel one. There are many situations in which a bailment contract or a similar obligation to return property or pay compensation for its use has been implied-in-fact from the conduct or the statutory duties of government agents. In *C.F. Harms Co.* v. *Erie R. Co.*, 167 F.2d 562 (2d Cir. 1948), for example, a charterer of a barge was ordered to deliver the barge and the equipment on it to the Army at a particular pier. While it was in the custody of the Army,

delivered from Customs until it had been "inspected, examined or appraised" and was reported to have been accurately invoiced. If goods had not been properly invoiced, with fraudulent intent, they were "liable to seizure." Otherwise, after the proper duties were assessed and paid, the goods could be released. Under the procedure at issue here, the importer could institute administrative process to challenge the seizure and, if it prevailed, the merchandise was to be "returned forthwith to the claimant." 28 U.S.C. § 2465. If, as here, Customs found that the importer had no knowledge of the false statement that caused the seizure or that there were mitigating circumstances, it could impose a reasonable condition and then return the goods. *See* 19 U.S.C. § 1618.

Hence there is no real difference, for bailment purposes, between the "detention" in *Alliance* and the "seizure" in this case. Both cases involved temporary detentions that could have led to permanent forfeiture. In both cases, following administrative procedures, the goods were released.

the barge was damaged in a storm. Although no express agreement had been made as to the responsibility of the Army to maintain or protect the barge, the Court of Appeals for the Second Circuit, in an opinion by Judge Learned Hand, found an implied-in-fact contract of bailment upon which the government could be sued under the Tucker Act (167 F.2d at 564):

> [H]ere it seems to us that there was a bailment, view the evidence as one will. The Army's control was unconditional; it need ask no leave of the Railroad for anything it might do; it could move the [barge] whither and when it chose; discharge her, or hold her, as it pleased. This officer in charge understood; the Railroad understood; and each knew that the other so understood; and we can find nothing lacking which is essential to a bailment.

Accord, Gulf Transit Co. v. *United States,* 43 Ct.Cl. 183, 193 (1908). *Cf. Keifer & Keifer* v. *Reconstruction Finance Corp.,* 306 U.S. 381, 387 (1939); *Jaeger* v. *United States,* 394 F.2d 944, 946 (D.C. Cir. 1968); *Van Buskirk* v. *United States,* 206 F.Supp. 553, 558 (E.D.Tenn. 1962); *Marine Insurance Co.* v. *United States,* 410 F.2d 764, 766 (Ct.Cl. 1969).

Similarly, an implied-in-fact contractual obligation arises where there is a statutory duty to return or pay compensation for property. *Campbell* v. *United States,* 107 U.S. 407 (1883); *Foster* v. *United States,* 32 Ct.Cl. 170 (1897); *Taylor* v. *United States,* 14 Ct.Cl. 339, 353 (1878). This principle has been applied to seizures by the government in various contexts. For example, where the Internal Revenue Service seized goods and stored them pursuant to regulations that contemplated payment for the use of such

premises, the court found an implied promise to pay the party whose premises were used, even though the government thereafter denied any intent to obligate itself *(Maryland National Bank v. United States,* 227 F. Supp. 504, 507-508 (D.Md. 1964)):

> The intent of the government to obligate itself may be implied from other provisions of the regulations . . . . These regulations provide that the United States shall pay for the expenses of the levy from the proceeds of the sale . . . .
>
> The court therefore finds an intent on the part of both parties to obligate themselves and a contractual relationship, implied in fact, between them.

Accord, Feldwin Realty Co. v. *United States,* 169 F. Supp. 73 (D.N.J. 1959).[11]

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[11]Similarly, where the United States appropriates lands for its own use, or where, in the process of taking land, it floods adjoining property, it can be sued upon an implied-in-fact promise to provide "just compensation" as required by the Fifth Amendment, just as it can be sued directly under that constitutional provision. *United States v. Dickinson,* 331 U.S. 745, 748 (1947); *United States v. Lynah,* 188 U.S. 445, 464-65 (1902); *United States v. Great Falls Mfg. Co.,* 112 U.S. 645, 656-57 (1884). *Cf. United States v. Causby,* 328 U.S. 256, 267 (1946). As the Court in *Dickinson* explained (331 U.S. at 748):

> These suits against the Government are authorized by the Tucker Act either as claims "founded upon the Constitution of the United States" or as arising upon implied contracts with the Government. (See . . . *United States v. Lynah* . . . .) But whether the theory of these suits be that there was a taking under the Fifth Amendment, and that therefore the Tucker Act may be invoked because it is a claim founded upon the Constitution, or that there was an implied promise by the Government to pay for it, is immaterial. In either event, the claim traces back to the prohibition of the Fifth Amendment, "nor shall private property be taken for public use, without just compensation."

A finding that the government is a party to an implied contract based upon the conduct or duties of its agents is not negated by a subsequent denial of responsibility by the government. *Algonac Manufacturing Co.* v. *United States,* 428 F.2d 1241, 1257 (Ct.Cl. 1970). An implied-in-fact contract exists where the circumstances and the statutory context indicate that the government had a duty to act in a particular manner with regard to a private party's property and that party reasonably expected the government to do so.

II
THE TORT CLAIMS ACT DOES NOT BAR AN ACTION FOR THE LOSS OF DETAINED GOODS

Although the Court of Claims acknowledged that there was substantial basis for finding an implied-in-fact contract properly to preserve and redeliver petitioner's goods, the Court dismissed petitioner's breach-of-contract action on the ground that such a claim was barred by the proviso to the Federal Tort Claims Act which exempts the United States from tort liability "arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer." This clause, included in the original 1946 enactment of the Federal Tort Claims Act (60 Stat. 842), now appears as Section 2680(c) of the Judicial Code, 28 U.S.C. § 2680(c).

The Court of Claims' interpretation of Section 2680(c) is erroneous, however, because it conflicts with the language of the statute as well as with its legislative history. The decided cases that have analyzed the exemption of Section 2680(c) in light of the policies which impelled Congress to

enact it, have properly concluded that Section 2680(c) exempts only claims based upon a customs officer's *detention* of goods, and not claims for loss or damage suffered by goods after they have been detained.

A. The Words Used in Section 2680(c) Are Inconsistent with the Court of Claims' Broad Interpretation

The language used by Congress in Section 2680(c), when compared with that used in the eleven other exceptions enacted by Congress at the same time, demonstrates that subsection (c) was not intended to provide broad immunity for all acts committed by federal customs officials. Instead, Congress exempted from federal tort liability only injuries attributable to the bare detention of goods by customs officers.

The full text of Section 2680 as it was enacted in 1946, appears in Appendix A to this brief (pp. 1a - 2a, *infra).* The full section was titled "Exceptions," and it enumerated the various exclusions which Congress wished to make to the basic liability provisions of the Act. Subsection (c) differs from the various broad exceptions in Section 2680 in several major respects:

First, subsection (c) is not a blanket exemption for all of the activities of any particular agency of government or for all injuries attributable to the enforcement or administration of any particular federal statute. If Congress had wanted to exempt the Customs Service from liability or had wanted to immunize the federal government for any losses related to enforcement of the customs laws, it could have provided an exemption for "any claim arising from the activities" of the Customs Service (as appears in subsections (j) and (l)) or for "any claim arising out of an act or omission . . . in administering the provisions" of

the customs law (as appears in subsection (e)). The language of subsection (c) is much more narrow than these broad functional exceptions. It exempts *only* injuries attributable to the "assessment or collection" of a tax or customs duty or to the "detention" of goods.

Second, the language of subsection (c) differs markedly from that of its immediate predecessor, subsection (b). Whereas subsection (b) exempts "any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter," subsection (c) makes no reference whatever to "loss" or to any other form of damage to goods. It is limited to "detention" only. Congress was plainly conscious of the words it could use to exempt from liability any harm caused to privately owned property by officials of the federal government. It chose to provide that exemption in subsection (b), wherein it dealt with Postal Services, but not in subsection (c), where it set forth the exception applicable to the activities of the Customs Service.

Third, even the term used in describing the causal nexus between the governmental acts and the injury suffered by the claimant is uniquely narrow in subsection (c). Whereas the other exceptions cover claims "arising out of" (subsections (b), (e), (h), (j)), "arising from" (subsections (g), (1)), or "caused by" (subsections (f), (i)) specified governmental acts or legislative authorizations, subsection (c) is the only exception which is limited to claims "arising in respect of" defined governmental conduct. This more limited phrasing negates any suggestion that losses suffered *after* a detention by Customs, and arguably arising "out of" or "from" the detention, or "caused by" the detention, were also immunized by the Congress.

B. The Legislative History of Section 2680(c) Conflicts with the Construction of the Court of Claims.

The inferences that one draws from the distinctions in language among the exceptions included in Section 2680 are supported by the legislative history of that provision. The reports of the Congressional Committees and the testimony provided to the Congress demonstrate that significantly different policies were at play in the enactment of these exceptions. Specifically, the exceptions enumerated in Section 2680 were of two different varieties:

(1) One group of exceptions expressed a legislative policy of immunizing acts of government officials which were thought by Congress to be so intrinsically a part of day-to-day government activities that a waiver of sovereign immunity would be contrary to the public interest. Congress thought that permitting lawsuits in this area — typified by the Postal Service's delivery of United States Mail — would open the floodgates to countless civil actions against the federal government.

(2) A second group of exceptions was included in the Tort Claims Act not because Congress wanted to immunize acts of government officials in these areas but because existing law had provided other remedies for such conduct. Congress did not want to superimpose the Tort Claims Act on these existing remedies.

Subsection (c) was in the second group. The exception in that subsection was not intended, in light of these policies, to exempt the Customs Service from all liability, but rather to avoid interfering with the existing remedial machinery for challenging the detention of goods or the assessment of duties. So far as loss or damage goes,

however, Congress deliberately did not immunize the United States from liability for conduct causing this harm.

The report of the House Judiciary Committee which accompanied the version of the Federal Tort Claims Act that came before the House of Representatives in November 1945 explained that the exemptions contained in the present Section 2680 (apart from the "discretionary function" exemption in the first subsection) were of two varieties (H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945):

> The other exemptions in section 402 relate to certain governmental activities which should be free from the threat of damage suits, or for which adequate remedies are already available.

In other words, Congress was providing *either* that certain governmental activities should not be subject to damage suits at all *or* that certain harm was already sufficiently covered by existing remedial provisions. A similar dual categorization of many of the exemptions in the present Section 2680 was included in Sen. Rep. No. 1400, 79th Cong., 2d Sess. 33 (1946), when the Federal Tort Claims Act was offered for Senate consideration as part of the Legislative Reorganization Act of 1946, the form in which it was ultimately adopted.

The exemption provided in subsection (c) was in the second of these categories (*i.e.*, it related to "governmental activities . . . for which adequate remedies are already available"), and not in the first category (*i.e.*, it did not involve "governmental activities which should be free from the threat of damage suits"). The most detailed official analysis of the enumerated exemptions was provided in hearings held in 1940 before a Subcommittee of the Senate Judiciary Committee, and it was in those hearings that the exemptions were explained by future District Judge

Alexander Holtzoff, who was then a Special Assistant to the Attorney General and served as the Executive Branch's principal spokesman in the drafting of the Federal Tort Claims Act. Mr. Holtzoff's testimony with regard to what are now subsections (b) and (c) of Section 2680 was as follows (Hearings on Tort Claims Against the United States (S. 2690) before a Subcommittee of the Senate Judiciary Committee, 76th Cong., 3d Sess. 38 (1940) (emphasis added)):

> Section 303 contains a list of claims that are to be excluded from the scope of the proposed legislation. There are 12 such classes.
>
> The first is any claim arising out of the loss of, miscarriage, or negligence in the transmission of letters or postal matter. Every person who sends a piece of postal matter can protect himself by registering it, as provided by the postal laws and regulations. It would be intolerable, of course, if in any case of loss or delay the government could be sued for damages. Consequently, this provision was inserted.
>
> The second exception relates to claims arising in respect of the assesment or collection of any tax or customs duty or the detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer. *There are various tax laws providing the machinery for recovering any back tax that has been paid but was not properly owing. There was no purpose in interfering with that machinery.*

Apparently as a result of Mr. Holtzoff's testimony in 1940, the conclusion that some of the exemptions now included in Section 2680 represented instances where "adequate remedies are already available" was repeated in legislative reports and hearings in succeeding years. See Hearings on Tort Claims (H.R. 5373 and H.R. 6463) before the House Committee on the Judiciary, 77th Cong., 2d Sess. 28, 44 (1942); H.R. Rep. No. 2245, 77th Cong., 2d Sess. 10 (1942); S. Rep. No. 1196, 77th Cong., 2d Sess. 7 (1942). This consistent pattern demonstrates that the successive Congresses which considered the Federal Tort Claims Act provisions in the several years prior to its passage viewed subsection (c) as granting no real exemption. It was, rather, designed to prevent owners of detained goods from pursuing an overlapping or additional remedy.

The statutory remedies which Congress wished to leave undisturbed permitted challenges to (1) the propriety of a detention and (2) the duty assessed. 19 U.S.C. §§ 1602-1614 (1946); 19 U.S.C. §§ 1514-1519 (1946); 28 U.S.C. §§ 296-297 (1946); 28 U.S.C. § 2674 (1940). There were, on the other hand, no particular statutory procedures for the recovery of damages for loss or damage to goods while in the custody of Customs officers. The exception now contained in Section 2680(c) was limited, therefore, to suits challenging the imposition of duties or a decision to detain goods.[12] It was not a blanket exemption

[12]A challenge to a Customs seizure or detention must follow the administrative process provided by Congress and may not be achieved through the Tort Claims Act. For example, the court in *DeBonis* v. *United States*, 103 F.Supp. 119, 121 (W.D.Pa. 1952), held that there was no jurisdiction under the Tort Claims Act to challenge a customs detention:

> Our reasons for thus concluding is that Congress who set forth in the forfeiture acts the specific manner in which the issues of illegal seizure and forfeiture should be litigated,

(cont'd)

for all activities of Customs officers, and it was surely not an exemption from liability for the loss of goods held in the custody of the Customs Service.

This understanding of the legislative history of subsection (c) is corroborated by the unanimous view of legal commentators. The leading articles analyzing the Federal Tort Claims Act have all read subsection (c) as exempting from the Act only the kind of conduct which was covered by pre-existing statutory remedies. The comprehensive Note on *The Federal Torts Claims Act,* 56 Yale L.J., 534, 545-546 (1947), explained the purpose of the postal exception as follows (footnotes omitted):

> Closely related to [the] general immunity for official acts are four specific exceptions which provide that the jurisdiction of the courts shall not extend to: "any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter;" "any claim arising out of an act or omission of any employee of the Government in administering the provisions of the Trading with the Enemy Act, as amended;" "any claim for damages caused by the imposition or establishment of a quarantine by the United States," and "any claim for damages caused by the fiscal operation of the Treasury or by the regulation of the monetary system." These provisions . . . cover even gross negligence in performing a ministerial duty . . . . These four exceptions reveal an abundance of caution on the part of

did not intend that these issues should be litigated under the general provisions of the Federal Tort Claims Act.

Accord, Bambulas v. United States, 323 F.Supp. 1271, 1273 (W.D.S.D. 1971); *Newstead v. United States,* 258 F.Supp. 250, 251 (E.D.Mo. 1966).

> Congress in relaxing the Government's immunity. . . . The postal exception is based on the number of cases which might arise were it not included.

The customs exception is however, placed in a different group (*id.* at 547-548; emphasis added):

> Another group of exceptions is included *because of satisfactory provisions already made for handling the claims covered.* This group includes the collection of taxes and customs duties, maritime torts, injury to vessels or their cargo, crew or passengers while in the Panama Canal, and the activities of the TVA.

The same distinction was drawn in *The Federal Tort Claims Act,* 42 Ill. L. Rev. 344, 360 (1947) (footnote ommitted and emphasis added):

> Another group of exceptions, which exempt claims arising out of losses of postal matter, operations of the monetary system and losses due to activities of the military forces, may be explained by the historical desire of the government to maintain its immunity from suit in instances where it cannot reasonably determine or limit the amount of its future liability. Claims in respect to the collection of taxes or retention of goods by customs officers, admiralty claims covered by the Acts of 1920 and 1925, injuries incurred in the Panama Canal, and damages caused by activities of the Tennessee Valley Authority are also exempted, *since remedies for these claims are provided in other statutes.*

In Gottlieb, *The Federal Tort Claims Act – A Statutory Interpretation,* 35 Geo. L.J. 1, 45 (1946), the purpose of the postal matter exception was said to be "clear on its face and [to] follow the basic principle underlying the non-statutory exceptions in this section, namely, that certain functions of the Government by their very nature should operate unhampered by threat or burden of law suits." By contrast, the author said, the basis for the customs exception "lies in the existence of an adequate, subsisting remedy upon which suits against the United States have heretofore been entertained." *Accord,* Gellhorn and Schenck, *Tort Actions Against the Federal Government,* 47 Colum. L. Rev. 722, 729-730 (1947); Jayson, *Federal Tort Claims Act,* §§ 225, 256 (1977).

The language and purpose of subsection (c) were correctly discerned by the Court of Appeals for the Second Circuit in *Alliance Assurance Co.* v. *United States,* 252 F.2d 529 (2d Cir. 1958), the decision which concededly conflicts squarely with the decision of the Court of Claims in this case.[13] In *Alliance,* the Second Circuit rejected the government's argument that "a 'detention' as used [in the Tort Claims Act] encompasses not only a refusal to deliver goods admittedly in the possession of customs authorities but a loss of goods formerly in their possession," as unsupported by either the language of the Act or its purpose (252 F.2d at 533-534):

[13]None of the federal decisions which read Section 2680(c) as conferring a broader immunity or which distinguish *Alliance* either examined the legislative history of Section 2680(c) or dealt explicitly with the narrow language of that subsection. *See United States v. One (1) 1972 Wood, 19 Ft. Custom Boat,* 501 F.2d 1327 (5th Cir. 1974); *United States v. 1500 Cases, More or Less, Etc.,* 249 F.2d 382 (7th Cir. 1957); *Walker v. United States,* 438 F.Supp. 251 (S.D.Ga. 1977); *S. Schonfeld Co. v. SS Akra Tenaron,* 363 F.Supp. 1220 (D.S.C. (cont'd)

> The probable purpose of the exception was to prohibit actions for conversion arising from a denial by the customs authorities or other law enforcement agencies of another's immediate right of dominion or control over goods in the possession of the authorities.

The Second Circuit found the comparison with Section 2680(b) – the postal exception – particularly telling *(ibid.):*

> That the exception does not and was not intended to bar actions based on negligent destruction, injury or loss of goods in the possession or control of the customs authorities is best illustrated by the fact that the exception immediately preceding it expressly bars actions "arising out of the loss, miscarriage, or negligent transmission" of mail. 28 U.S.C.A. § 2680(b). If Congress had similarly wished to bar actions based on the negligent loss of goods which governmental agencies other than the postal system undertook to handle, the exception in 28 U.S.C.A. § 2680(b) shows that it would have been equal to the task. The conclusion is inescapable that it did

1973); *United States v. Articles of Food, Etc.,* 67 F.R.D. 419 (D.Idaho 1975).

Almost all of these cases, which deny jurisdiction under the Federal Tort Claims Act pursuant to Section 2680(c), involve claims for the return of goods or for damages resulting from a detention *per se,* as opposed to subsequent damage to or loss of seized goods. *United States v. 1500 Cases, supra; Walker v. United States, supra; United States v. Articles of Food, supra. See also, United States v. One 1951 Cadillac Coupe de Ville,* 125 F.Supp. 661 (E.D.Mo. 1954). These cases are plainly distinguishable from the present case.

not choose to bestow upon all such agencies general absolution from carelessness in handling property belonging to others.

And in *A-Mark, Inc.* v. *United States Secret Service*, 593 F.2d 849 (9th Cir. 1979) (Pet. Reply App., pp. 1a-5a),[14] the Court of Appeals for the Ninth Circuit reached the same conclusion. In a suit for damage to a rare coin seized by the Secret Service, the Court held:

> [T]he exception reaches only those claims asserting injury as a result of the fact of detention itself where the propriety of the detention is at issue, and does not reach claims where the injury is asserted to result from negligent handling of property in the course of detention.

See also United States v. *Lockheed L-188 Aircraft*, No. 77-1131 (9th Cir. Feb. 15, 1979), n.16 (Section 2680(c) bars suit for loss of services of detained vehicles but not for damage to the vehicles).[15]

The holding of the Court of Claims – that Section 2680(c) bars a claim for damage or loss to detained goods – is plainly erroneous. Without studying the legislative history, without comparing the more narrow language of the postal exception, without considering the various cases

[14]"Pet. Reply App." refers to the Appendix to the Petitioner's Reply Memorandum filed in this case.

[15]In *Marine Insurance Co. v. United States*, 410 F.2d 764, 765 (Ct.Cl. 1969), the court denied recovery for the loss of gems during a mail search because the lost package was "postal matter," not "customs matter," at the time that it was lost. *Cf. DeBonis v. United States*, 103 F.Supp. 123, 126 (W.D.Pa. 1952) (Section 2680(c) does not bar action for damages from seizure of automobile) (dictum)); *Otten v. United States*, 210 F.Supp. 729, 731 (S.D.N.Y. 1962) (Section 2680(c) does not bar suit against federal marshal who holds stolen bonds no longer needed as evidence).

relating to this question, the Court of Claims dismissed petitioner's "strong case for the existence of an implied-in-fact contract" in two sentences (App., p. 31a):

> With. . . strong, all-inclusive language, the legislative branch of our Government affirmatively recognized the vital importance to the public of unimpeded lawful operations by customs officers and refused to waive sovereign immunity with respect to those functions specified. Notwithstanding the possible interpretation which the *Alliance* court might give to the facts now before us, it appears clear to us that Hatzlachh's claim obviously arose "in respect of . . . the detention of . . . goods or merchandise by [an] . . . officer of customs . . . ."

It is clear from the legislative history that the language of Section 2680(c) is not "all-inclusive" but is, rather, narrowly tailored to exempt from suit only actions challenging the detention of goods or the imposition of a duty, because there were, prior to enactment of the Federal Tort Claims Act, procedures for such challenges established by Congress. Section 2680(c) was not intended to immunize all actions of the Customs Service, and it does not reach the conduct that is the basis of this lawsuit.

III

GOVERNMENT CONDUCT EXEMPTED FROM LIABILITY UNDER THE TORT CLAIMS ACT MAY BE THE BASIS FOR SUIT UNDER THE TUCKER ACT

We have demonstrated that, contrary to the conclusions of the court below, Section 2680(c) does not exempt the government from tort liability for loss or damage to goods detained by Customs officers. Even if we are wrong on this proposition, however, the Court of Claims erred in dismissing petitioner's suit because petitioner's claim was not based on tort liability but on an implied contract of bailment, and implied contracts are not at all the subject of the Federal Tort Claims Act.

The court below acknowledged that this was not a tort case, but it nonetheless dismissed petitioner's claim on the theory that it would be "a trespass on congressional prerogatives" to permit a party to sue on an implied contract if the same facts are covered by a legislative exception from liability under the Federal Tort Claims Act. App., p. 31a. The Court of Claims' reasoning and conclusion are patently wrong.

Almost a century before the enactment of the Federal Tort Claims Act, the Congress subjected the United States to suit in the Court of Claims on express and implied contracts. 10 Stat. 612 (1855); 12 Stat. 765 (1863). The Tucker Act of 1887 (24 Stat. 505) continued and extended the government's contract liability, and granted concurrent jurisdiction over some contract claims to the district courts. When Congress also opened the government to tort liability with the 1946 adoption of the Tort Claims Act, it did not cut back on pre-existing contract liability under the Tucker Act. In fact, the "exceptions" provision which is the subject of this case, 28 U.S.C. §2680, states

explicitly that "[t]he provisions of *this chapter* and *Section 1346(b) of this title* shall not apply to" the enumerated exemptions (emphasis added). Thus, Section 2680 is applicable only to *tort* actions. Neither expressly nor impliedly did Congress in the Federal Tort Claims Act immunize governmental agencies from contract claims which could have been pursued before the Federal Tort Claims Act was adopted.

Numerous decisions of federal courts have held that whether an action against the government would be barred as a tort claim has no effect on whether it may be brought as a contract claim. In *United States v. Lockheed L-188 Aircraft*, No. 77-1131 (9th Cir. Feb. 15, 1979), the Ninth Circuit held that a claim that sounded in tort could also be brought under the Tucker Act's provisions for suits "founded . . . upon the Constitution." *In Palomo v. United States*, 188 F.Supp. 633 (D.Guam 1960), it was held that the lessor of property to the United States could sue in tort for damages for waste, or could elect to proceed upon the contract. In *Burtt v. United States*, 176 Ct.Cl. 310, 314 (1966), the court stated: "[W]here an enforceable contract was alleged, an action for breach was not without the bounds of the Tucker Act simply because elements of tort were present in the claim." *Cf. Bambulas v. United States*, 323 F.Supp. 1271, 1273 (W.D.S.D. 1971) and *Newstead v. United States*, 258 F.Supp. 250, 251-252 (E.D.Mo. 1966) (claims under Tucker Act considered after conclusion that tort claim would have been barred by 28 U.S.C. § 2680(c)). *See also Regional Rail Reorganization Act Cases*, 419 U.S. 102, 127-136 (1974) (passage of Rail Act did not withdraw Tucker Act remedy).

With respect to bailments in particular, a bailor may sue the government in tort, for negligent handling of property, or for breach of a contract of bailment. In *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381 (1939), a

suit brought before the enactment of the Federal Tort Claims Act, this Court rejected the government's argument that it could not be sued for breach of a contract of bailment because it could not then have been sued for negligence on a tort theory. The Court noted that the duty of a bailee to exercise ordinary care has its "sources in contract even though the guilty agents may be merely tortfeasors." 306 U.S. at 395. Similarly, in *New England Helicopter Service v. United States,* 132 F.Supp. 938, 939 (D.R.I. 1955), the district court rejected the government's argument that the sole remedy available for a breach of contract of bailment was suit under the Tucker Act, noting that the United States was to be "treated as if it were a private person" and a private person, in similar circumstances, could be sued in either tort or contract.[16]

The principle followed by the Court of Claims has the unusual — and plainly erroneous — effect of using the Federal Tort Claims Act to bar an implied contract action that could have been successfully maintained before the government's immunity from tort suits was waived. This would be contrary to the overriding purpose of the Federal Tort Claims Act, which was designed to facilitate claims against the government, not to bar them by arbitrary classifications.[17] As the Third Circuit observed in *Aluetco*

[16] *See Boland v. Southern Ice Co.,* 80 F.Supp. 924 (E.D.S.C. 1948); 8 C.J.S. *Bailments* § 44(b).

[17] The legislative history of the Federal Tort Claims Act expresses "the congressional desire to avoid unnaturally restrictive interpretation" of the waiver of sovereign immunity (Gellhorn and Schenck, *Tort Actions Against the Federal Government,* 47 Colum. L.Rev., 722, 727 (1947) (footnote omitted)):

> [T]he whole atmosphere surrounding the passage of the present statute manifests a legislative desire to be rid of finicking restraints upon the right to sue the sovereign. One may anticipate that courts, mindful of the background of the law, will approach it with an attitude somewhat like that of Justice Cardozo, who asserted two

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Corp. v. United States, 244 F.2d 674, 679 (3d Cir. 1957), when it rejected the argument that a claim must be classified as either a tort or a contract so that the Federal Tort Claims Act or the Tucker Act would apply exclusively:

> [R]equiring strict enforcement of the distinction . . . would be contrary to the purpose for which the Tort Claims Act was enacted. The waiver of immunity of the United States to suit was the primary purpose of the various enactments conferring jurisdiction on the federal courts to hear such suits . . . . [T]he jurisdiction of [the Court of Claims] has been sustained where elements of both contract and tort were involved in the claim.

In the same vein, this Court refused to read the contract adjudication provisions of the Tucker Act — even before the Federal Tort Claims Act was adopted — as excluding claims "sounding in tort." It said in *Keifer & Keifer* v. *Reconstruction Finance Corp.,* 306 U.S. 381, 395-396 (1939):

> When it chose to do so, Congress knew well enough how to restrict its consent to suits sounding only in contract . . . [I]t ought not to be assumed that when Congress consented "to suit" without qualification, the effect is the same as though it had written "in suits on contract, express or implied, not sounding in tort." No such distinction was made by Congress . . . .

> decades ago that "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."

The contrary result reached by the court below grew out of the misapplication of a line of decisions based on a substantially different principle of statutory construction. Where Congress has specified a distinct procedure and provided a particularized remedy for certain kinds of claims, neither the Federal Tort Claims Act nor the Tucker Act may be used to circumvent the prescribed statutory remedy. *Feres v. United States,* 340 U.S. 135 (1950), and *Stencel Aero Engineering Corp* v. *United States,* 431 U.S. 666 (1977), presented that kind of situation — which is entirely dissimilar to the situation presented by this case.

Both *Feres* and *Stencel* concerned efforts to bypass the procedures set forth in the Veterans' Benefit Act for injuries sustained while in military service. In *Feres,* this Court held that a serviceman must follow the procedural and substantive provisions of statutes aimed specifically at injuries sustained while in service, and in *Stencel,* this Court applied the *Feres* rule to indemnity claims by third parties, because otherwise the specific statutory scheme would have been easily avoided.

The principle of these rulings is plainly inapplicable where there is no particularized statutory mechanism governing the claim made against the United States. If there were a federal statute setting forth procedures and substantive rules concerning loss or damage to property temporarily in the custody of the United States, the *Feres* case might be authority for remitting petitioner to that course and denying it access under the Tucker Act or the Tort Claims Act. But in the absence of any such specific procedure, a contract claim cannot be rejected simply because Congress did not choose to open the courthouse doors to a tort claim based on the same facts.[18]

[18]Moreover, as the Court of Claims observed in expanding on *Feres* in *Jackson v. United States,* 573 F.2d 1189, 1198 (Ct. Cl. 1978), no serviceman had ever been awarded damages for military injuries on

(cont'd)

IV

NO VALID REASONS OF POLICY JUSTIFY IMMUNIZING THE UNITED STATES AGAINST LIABILITY FOR LOSS OR DAMAGE TO SEIZED GOODS

We have established, in the preceding sections of this Brief, that the common law viewed a governmental seizure of goods as giving rise to a bailment relationship, that the language and legislative history of the Federal Tort Claims Act indicate that Congress waived sovereign immunity for loss or damage to seized goods, and that exceptions in the Federal Tort Claims Act ought not, in any event, apply to contractual claims. We turn now to a final question: Is there any reason based on sound federal policy to deny a right of action to the owner of goods that have been lost or damaged while in the custody of the Customs Service?

There is, we submit, no policy justification for barring a lawsuit of this kind. In such a case, private property taken by government officials without the consent of the owner has been damaged or has disappeared. It is obviously unjust to expect the owner of the property, who did not willingly deposit his merchandise with the United States and who had no control or custody over the goods when they were damaged or taken, to bear the loss. As the United States has agreed to be liable for contract obligations expressly or impliedly assumed by its agents in the execution of their duties as well as for negligent acts performed while they are carrying out their official functions, the United

either tort or contract theories. Hence it was reasonable to assume that Congress did not intend to permit this kind of claim when it waived sovereign immunity for either contract or tort actions. By contrast, the United States has often been held liable as a bailee, *e.g., Agnew v. Haymes,* 141 F.631 (4th Cir. 1905), and liability on that ground for the acts of government employees was, in all likelihood, in the contemplation of the Congresses that enacted the laws.

States should compensate the private citizen, in the same manner as a private bailee would do, if the citizen's goods are harmed or lost while they are in the United States' custody.

Had a private party offering services to the public — such as a warehouseman or wharfinger — lost goods similarly in his custody, he would have been held liable, simply on the basis of his possession of the property and his duty to return the property. 8 Am. Jur. 2d *Bailments* §§45, 50. All the more reason exists to find a bailment where, as here, the goods were taken against the will of the owner, and where, as here, the bailor had no choice among bailees.

The Court of Claims suggested that permitting lawsuits in these circumstances could interfere with "the vital importance to the public of unimpeded, lawful operations by customs officers. . ." (App., p.31a). In fact, since an action could be successfully maintained only if detained goods have been lost or damaged, it is hard to see how the usual "lawful operations" of the Customs Service could be impeded by permitting such claims. Only in the unusual situation in which property is missing or is physically harmed could the owner sue the United States. The mere act of "detention" could not be the basis for a lawsuit.

Indeed, as is often true of tort remedies, the prospect of civil liability would have a beneficial deterrent effect. It would encourage the Customs Service and its officials to devise methods for guarding and storing private property that would satisfy standards of reasonable care. If the government were immune from civil liability for damage or loss, there would be little or no incentive for government officials to maintain seized goods in proper storage facilities. Nor, so long as the risk of loss remains entirely with the private owner, would the government have any

incentive to impose stringent safeguards against theft or carelessness by its employees. Permitting lawsuits of this kind, on the other hand, highlights circumstances which have given rise to damage or loss and thereby encourages greater care in the future.

Conversely, the private owner would be left virtually remediless if liability were foreclosed. Unlike the situation in the case of postal matters, insurance for damage or loss after a Customs seizure is not routinely available in ordinary commercial transactions. Indeed, the standard form "Marine Open Cargo" insurance policy *excludes* from liability losses due to "seizure arrest, retraint, detainment, confiscation . . . *and the consequences thereof* . . . whether lawful or otherwise." Marine Open Cargo Policy, American Institute of Marine Underwriters, para. 17a. (emphasis added). Thus, unlike the postal situation, the risk of harm or loss attributable to negligence or theft by government employees cannot routinely be shifted to an insurer.

Equity and sound management of the federal establishment warrant placing the cost of damage or loss incurred while goods are in federal custody on the United States and not on the owner of private property. No legitimate government function would be impeded and no proper government interest would suffer.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Claims should be reversed.

Respectfully submitted,

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APPENDIX A

28 U.S.C. §2680

The provisions of this title shall not apply to –

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by the Act of March 9, 1920 (U.S.C., title 46, sec. 781-790, inclusive), or the Act of March 3, 1925 (U.S.C. title 46, secs. 781 – 790, inclusive), relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the government in administering the provisions of the Trading with the Enemy Act, as amended.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing

through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.